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In the

Supreme Court of the United States

RICHARD L. MATHIAS, et al.

Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., et al.

Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the 7th Circuit

BRIEF OF THE STATES OF NEW JERSEY, ALABAMA, ALASKA, CONNECTICUT, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, MASSACHUSETTS, MICHIGAN, NORTH CAROLINA, OHIO, SOUTH DAKOTA, UTAH, AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI

Local telephone service has traditionally been regulated by state public utility commissions. Although advances in technology have led Congress to assume a larger role in regulating local phone service, it recognized in the Telecommunications Act that this is an area in which both interstate and intrastate commerce are inextricably linked. The Act thus sets out an allocation of responsibilities between the states and the Federal Communications Commission ("F.C.C.") that seeks to balance both state and federal interests. The *amici* states have a significant interest in seeing that this allocation is properly construed so as to preserve each state's ability to protect its citizens. *Amici* also have an interest in ensuring that the Act is construed to respect state sovereignty.

SUMMARY OF ARGUMENT

Over the last twenty years, telephone service has been transformed from what was perceived to be a "natural monopoly" to an industry in which competition is encouraged. Throughout this period of deregulation, Congress, the F.C.C. and State public utility commissions have worked to maintain a balance between state and federal oversight, with a goal of encouraging competition while preserving access to this essential public service.

The Telecommunications Act of 1996 Act reflects this balance. Although the Act provides for federal regulation in areas that had previously been regulated exclusively by the states, it expressly preserves state jurisdiction over certain areas of local concern. Though the result may be novel, the Act's structure and language reflect an effort to reconcile both federal and state interests. Any construction of the statute must therefore be particularly loyal to its terms. Through

construction and implication, the court below expanded federal jurisdiction over state commission decisions. This extension is not provided for in the language of the statute and is inconsistent with the blended state/federal jurisdiction established by Congress in the Act. State commission decisions relating to the enforcement and subsequent interpretation of interconnection agreements should be reviewed pursuant to that state's normal procedures for appealing final agency action. This result, as opposed to the decision below, is consistent with the Act's language and overall structure.

The court below also interpreted the Telecommunications Act to provide a constructive waiver of Eleventh Amendment immunity for the state commissioners exercising implied powers under the Act. Constructive waivers of this sort are no longer permitted under this Court's decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). The authority of the state commission to enforce and interpret interconnection agreements, and federal court jurisdiction over that authority are not even expressly discussed in the Act. There is thus no clear and unmistakable intent expressed by Congress that exercising this authority constitutes a waiver of immunity. Nor is there any clear indication by the state commission that by exercising its authority under the Act it intended to knowingly and voluntarily relinquish its immunity. The Court's ruling below is therefore inconsistent with this Court's requirements for establishing waiver. See, *College Savings Bank, supra*, 527 U.S. 666; *Edelman v. Jordan,* 415 U.S. 651 (1974).

Even if the purported waiver in this case had been more explicit, conditioning regulatory jurisdiction on a waiver of immunity under these circumstances is improper. Far from constituting a "gift" or "gratuity," the condition is coercive,

requiring a state to choose between its constitutional rights and traditional aspects of state regulation that have been preserved by Congress in the Act.

Finally, this is not a situation where applying the exception to the Eleventh Amendment set forth in *Ex Parte Young,* 209 U.S. 123 (1908) is necessary to vindicate federal rights or ensure the primacy of federal law. In fact, a prospective injunction against the individual members of the state commission will not redress the injury claimed by respondents. No individual commissioner can unilaterally bind the commission, and the record reflects no imminent enforcement planned by any commissioner against respondents to enforce the interconnection agreement. This is not a situation where federal court intervention is necessary to ensure compliance with federal law. It is a fairly basic appeal of administrative agency action -- action that was based primarily on contract interpretation and matters of both state and federal law. The *Ex Parte Young* exception, therefore, does not apply.

ARGUMENT

I. FEDERAL COURT REVIEW OF STATE COMMISSION DECISIONS ENFORCING OR INTERPRETING APPROVED INTERCONNECTION AGREEMENTS IS CONTRARY TO THE LANGUAGE, STRUCTURE AND PURPOSE OF THE TELECOMMUNICATIONS ACT.

The Telecommunications Act does not specifically address how disputes regarding approved interconnection agreements between local telephone service providers will be resolved. The Courts of Appeals have generally found that the authority of state commissions to approve agreements implies authority to interpret and enforce them. Many of these Courts have also extended the jurisdictional provision in 47 U.S.C. §252(e)(6) to these decisions, even though the federal court's jurisdiction under that section is limited to decisions approving or rejecting agreements. This extension is inconsistent with the language, purpose and structure of the Act. Accordingly, if the federal jurisdictional provision is to survive, it must be limited to the express terms enacted by Congress.*

1. To ease the entry of new companies into the local telephone market, the Telecommunications Act of 1996 provides for the incumbent local phone company to negotiate agreements with potential competitors. 47 U.S.C. §252(a). Through these agreements, the companies arrange payments to each other for the use of their overlapping services. See, 47 U.S.C. §251. If the parties cannot agree to terms, the Act

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* The constitutionality of federal court review of decisions to approve or reject agreements is not at issue in this case. The states reserve the right to contest its validity.

provides procedures by which the agreements may be mediated or arbitrated by the state utility commission. 47 U.S.C. §252(a)(2), (b)(1). Whether negotiated, mediated or arbitrated, the parties must seek the approval of the state commission. 47 U.S.C. §252 (e). If a state commission fails to act on a request for approval, the agreement is deemed approved. 47 U.S.C. §252(e)(4).

Pursuant to 47 U.S.C. §252(e)(5), the F.C.C. may preempt a state commission's jurisdiction when the commission "fails to carry out its responsibility" under that section. Because non-action on a request for approval of an agreement results in the agreement being deemed approved, this section has been interpreted by the F.C.C. as applying to situations where the state commission fails to respond, within a reasonable period of time, to a request for mediation or arbitration, or fails to complete an arbitration within the time limits set forth in the statute. 47 C.F.R. 51.801.*

In this case, the challenged action did not involve the approval or rejection of an interconnection agreement. It also did not involve an action relating to the institution or completion of an arbitration or mediation. The action here relates to a petition filed with the state commission to resolve a disagreement between the parties as to the meaning of an already approved agreement.

There is no express provision in the Act providing for the state commissions to enforce or otherwise resolve disputes

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* Section 253(d) also permits the F.C.C. to preempt the enforcement of a state or local requirement if it violates 47 U.S.C. §253(a) or (b), prohibiting state requirements that interfere with a company's provision of service or that interfere with the universal service requirements of §254.

between the parties to a previously approved agreement. That power has been inferred by the federal courts and the F.C.C. from other provisions of the statute. In *Iowa Utilities Bd. v. F.C.C.*, 120 F.3d 753 (8th Cir. 1997), aff'd in part and rev'd in part, sub nom, *A.T. & T. Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), the Eighth Circuit held:

> We ... believe that state commissions retain the primary authority to enforce the substantive terms of the agreements made pursuant to sections 251 and 252. Subsection 252(e)(1) of the Act explicitly requires all agreements under the Act to be submitted for state commission approval.... We believe that the state commissions' plenary authority to accept or reject these agreements necessarily carries with it the authority to enforce the provisions of agreements that the state commissions have approved. [*Id.* at 804].*

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* In a footnote, the Court indicated its belief that review of such decisions would be in the District Court pursuant to §252(e)(6). *Id.* Since *Iowa Utilities Board*, there has been a split in the circuits regarding not only the jurisdiction of the federal courts to review enforcement decisions by state commissions, but the scope of any such review. Compare, *Bell South Telecommunications, Inc. v. North Carolina Utilities Commission*, 240 F.3d 270 (4th Cir. 2001); *Bell Atlantic Maryland v. MCI Worldcom*, 240 F.3d 279 (4th Cir. 2001) (state commission decisions interpreting interconnection agreements not reviewable in federal court under §252(e)(6)); *Southwestern Bell Telephone Co. v. Brooks Fiber Communications of Okla.*, 235 F.3d 493 (10th Cir. 2000) (state commission decisions interpreting interconnection agreements reviewed by District Court *de novo* as to both state and federal law); and *Southwestern Bell Telephone Co. v. Connect Communications*, 225 F.3d 942 (8th Cir. 2000) (state commission decision interpreting interconnection agreements reviewed by District Court to determine compliance only with federal law).

The Act does specify federal court jurisdiction over certain decisions of the state commissions under the Act. Section 252(e)(6) provides:

> In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

By its terms, the above provision establishes jurisdiction in the federal court only for "determinations" made by the state commission "under this section." Under the plain language of the statute, this would include decisions to approve agreements - either by failing to act or issuing orders of approval, and decisions to reject or modify agreements.* It does not by its terms apply to any other determinations that may be made by the state commissions under the Act. Nor does it expressly apply to the state commission's inferred authority to enforce or interpret agreements.

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* It is not specified in the statute whether decisions made in the course of arbitrations or mediations would be subject to this provision. However, because all agreements, whether negotiated or arbitrated must ultimately be approved by the state commissions, decisions made prior to the ultimate approval or rejection would not be final agency action subject to review. See, *Bennett v. Spear*, 520 U.S. 154 (1997).

2. The extension of federal jurisdiction to decisions other than those approving or rejecting agreements is not only beyond the plain language of the statute, it is inconsistent with the Act's overall structure and purpose. As the Court of Appeals for the First Circuit stated,

> the general policy expressed in the statute [recognizes] state authority over certain aspects of local telecommunications -- in areas over which the states held virtually exclusive sway prior to the enactment of the Act -- while ensuring compliance with federal law. The Act exemplifies a cooperative federalism system, in which state commissions can exercise their expertise about the needs of the local market and local consumers, but are guided by the provisions of the Act and by the concomitant FCC regulations. *[Puerto Rico Telephone Co. v. Telecommunications Regulatory Board of Puerto Rico,* 189 F.3d 1, 14 (1st Cir. 1999) (quoting *AT&T, supra,* 525 U.S. 366, n.6)].

Consistent with this shared federal/state responsibility, §252 specifically provides that, subject to the limitations on barriers to local markets provided in §253 of the Act, "nothing in this section shall prohibit a state commission from establishing or enforcing other requirements of state law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements." 47 U.S.C. §252(e)(3). Similarly, §253 of the Act, while prohibiting states from creating barriers to local markets, also preserves certain aspects of state jurisdiction. Subsection (b) provides that nothing in that section "shall affect the ability of a state to impose, on a competitively neutral basis,... requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure

the continued quality of telecommunications services, and safeguard the rights of consumers."* Section 253 also provides that the states retain authority to manage public rights-of-way, and require fair and non-discriminatory compensation for the use of rights-of-way.

The limitation provided in §252(e)(6) on the district court's jurisdiction reflects this residuum of state regulation. A district court's review of a state commission's approval or rejection of an agreement is limited to whether the agreement meets the requirements of sections 251 and 252. It does not by its terms cover other aspects of a state commission's decision, such as consistency with state law, or matters addressed in §253. See, *Puerto Rico Telephone Company, supra*, 189 F.3d 1. It is a very limited jurisdictional provision designed to permit federal courts to review final agreements solely to determine their consistency with federal law.**

After ensuring that the agreement is consistent with federal law, the federal court's oversight of the state commissions on this issue is over. If a petition is filed seeking an interpretation of an approved agreement, all the state commission is doing is attempting to give effect to the original agreement which was already subject to review by the federal court for consistency

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* Any such requirements must be consistent with 47 U.S.C. §254, which provides for a Federal-State Joint Board to establish universal service requirements relating to, inter alia, quality of service, rates, access to advanced services, and access in rural and high cost areas .

** Unlike some of the circuits that have addressed this issue, see, *e.g., Southwestern Bell Telephone, supra*, 225 F.3d 942, the Court below did limit its review to questions of federal law. A contrary ruling would be unconstitutional, as the federal court lacks power to "instruct state officials on how to conform their conduct to state law." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 117 (1984).

with the Act. This is a determination the state commissions are clearly equipped to make, as the determination of whether calls are local or long distance has traditionally been "determined exclusively" by state regulatory bodies. *U.S. v. Western Electric Co. v. A.T. & T.*, 569 F.Supp. 990, 994 (D.D.C. 1983). The state courts are more than capable of reviewing administrative agency action and the contractual issues that are likely to occur in these cases. They are also perfectly capable of ensuring compliance with federal law. *Testa v. Katt*, 330 U.S. 386 (1947). Indeed, state court review is more efficient, as the state courts would have jurisdiction over the entire matter, including questions of state law. *Pennhurst v. Halderman, supra*, 465 U.S. at 117.

3. Limiting §252(e) to its terms is also necessary to avoid constitutional doubt. See, *Almendarez-Torres v. U.S.*, 523 U.S. 224, 237 (1998) (Courts should avoid constructions of a statute that would render it unconstitutional). In *Printz v. United States*, 521 U.S. 898 (1997), the Court reiterated that under the Tenth Amendment, "The Federal Government may not compel the states to enact or administer a federal regulatory program." *Id.* at 925 (quoting *New York v. U.S.*, 505 U.S. 144 (1992)). Although the Court has upheld some "cooperative federalism" programs against Tenth Amendment challenges, see, *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264 (1981), and *FERC v. Mississippi*, 456 U.S. 742 (1982), the statutory scheme here does not merely provide for a delegation of federal authority to the states in an otherwise preempted field. *Hodel, supra*, 452 U.S. at 288. Rather, it contemplates shared federal/state regulation of local telephone service, with only some aspects preempted by the federal government. Unlike *FERC,* this is also not simply a situation where the states are being asked to include federal considerations in their oversight. They are being sued individually in federal court for an order compelling them to

exercise their jurisdiction in a particular manner. This statute therefore differs in significant ways from the Tenth Amendment cases cited by the Court in *Printz*, thus raising constitutional questions that should be avoided by construing the statute consistent with its express terms.

Limiting §252 to its terms would, as to the enforcement and interpretation of interconnection agreements, also prevent constitutional doubt with respect to the Eleventh Amendment. As discussed in Point II, below, if §252 is interpreted to provide state commission oversight of the enforcement and interpretation of agreements, and the jurisdictional provision in §252(e)(6) is interpreted to extend to such oversight, the provision would constitute an implied abrogation by Congress of the states' Eleventh Amendment immunity under its Commerce Clause authority, in contravention of this Court's decision in *Seminole Tribe of Florida v. Florida*, 516 U.S. 1044 (1996).*

In sum, if the jurisdictional provision of 47 U.S.C. §252(e)(6) is to survive at all, it must be limited to its express terms. By those terms, federal court review is solely of approvals or rejections of interconnection agreements and then only to determine consistency with federal law. While greater authority for the state commissions, such as the interpretation or enforcement of already approved agreements, may be implied, federal jurisdiction to review the states' exercise of

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* As noted by the Fourth Circuit in *Bell Atlantic Maryland, Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 308 (2001), *cert. pending*, Dkt. No. 00-1531, implied federal court authority to review the final decisions of the state commissions is also inconsistent with the well-established jurisdictional limitation on the federal courts set forth in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

those implied powers may not. The review of such decisions must proceed through the state courts as appeals of final agency action, with ultimate federal recourse to this Court.

II. THERE HAS BEEN NO KNOWING OR VOLUNTARY WAIVER OF ELEVENTH AMENDMENT IMMUNITY BY THE STATE COMMISSIONS. CONDITIONING THE RETENTION OF TRADITIONAL REGULATORY AUTHORITY OVER LOCAL TELEPHONE SERVICE ON A WAIVER OF IMMUNITY IS AN IMPERMISSIBLE AND COERCIVE SANCTION.

The Eleventh Amendment to the Constitution provides sovereign immunity to the states absent consent or abrogation consistent with the "constitutional design." *Alden v. Maine*, 527 U.S. 706 (1999). A state may consent to suit, but its actions must demonstrate a knowing and voluntary intention to relinquish its constitutional right. *College Savings Bank, supra,* 527 U.S. at 675. Statutes that rely on "cooperative federalism," involving shared federal/state regulation and/or funding, test the boundaries of knowing and voluntary waiver. In this case, the Court below stretched those boundaries too far, turning the doctrine of waiver into a means to achieve abrogation in a statute based on Article I powers. The decision below is contrary to this Court's recent cases regarding waiver and abrogation and is inconsistent with the constitutional design.

As noted, the Telecommunications Act preserves for the states the regulation of certain traditional areas of local concern. The Court below held that a jurisdictional provision in the statute demonstrates clear intent by Congress to condition a state's acceptance of these aspects of its traditional

authority on a waiver of immunity. Although the states' authority to enforce and interpret previously approved interconnection agreements is not express, but was inferred from the overall purpose and structure of the Act by the federal courts, the Court below held that the states had knowingly and voluntarily waived their immunity by exercising this regulatory "gift."

The Court's decision is incorrect for two reasons. First, the statutory provisions at issue here are not sufficiently unambiguous to result in a knowing and voluntary waiver by the states. They do not establish waiver as a condition "by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction." *Edelman v. Jordan, supra*, 415 U.S. at 673 (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151(1909)). Second, although this Court has suggested that Congress may have the authority under the Spending Clause to expressly condition the receipt of federal funds on a waiver of immunity, this reasoning should not apply to delegations of regulatory authority under the Commerce Clause. When what is attached to the refusal to waive is forcing a state to relinquish its power to protect the public interest, "the point of coercion is automatically passed -- and the voluntariness of waiver destroyed...." *College Savings Bank, supra,* 527 U.S. at 687. The statutory provisions here are thus insufficient to effectuate a waiver of immunity.

1. The Court below erred in finding the language of the statute sufficiently unambiguous to result in a knowing and voluntary waiver by the states. As the Court stated in *Edelman v. Jordan, supra*, 415 U.S. at 673, "constructive consent is not a doctrine commonly associated with the surrender of constitutional rights." This Court has therefore held that if Congress intends to impose a condition on the acceptance of

federal funds, it must do so unambiguously. In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981), the Court stated: "[b]y insisting that Congress speak with a clear voice, we enable the states to exercise their choice knowingly, cognizant of the consequences of their participation."

Thus, in the cases where the issue has been raised, the Court has applied a stringent test to determine if the statutory language was sufficient to result in a knowing and voluntary waiver of immunity. In each case, the Court found that the statute was not sufficiently unambiguous to result in a waiver. See, *Edelman v. Jordan, supra*, 415 U.S. at 674 (participation in a federal funding program was not sufficient, when the only sanction in the statute against a state that did not comply with the federal requirements was withdrawal of federal funding); *College Savings Bank , supra,* 527 U.S. at 680 (participation in an interstate activity was insufficient to constitute a constructive waiver of immunity, specifically overruling *Parden v. Terminal R. of Ala.*, 377 U.S. 184 (1964)). In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), the Court examined the former text of the Rehabilitation Act providing "[a] general authorization for suit in federal court." The Court ruled that a general jurisdictional provision "is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment," and that it "likewise falls far short of manifesting a clear intent to condition participation in the programs funded under the Act on a state's consent to waive its constitutional immunity." *Id.* at 246. Here too, the statute says nothing about Eleventh Amendment immunity but merely provides a general authorization for suit in federal court. Just as this language was found insufficient in *Atascadero*, it is insufficient to demonstrate unambiguously Congress' intent to condition continued state regulation as set forth in the Telecommunications Act, on a waiver of immunity.

There is also nothing here to demonstrate that the states, by exercising authority to enforce and interpret interconnection agreements, understood and accepted that such action would constitute a "knowing and voluntary" waiver of immunity. In *College Savings Bank*, 527 U.S. at 680, the Court explained:

> The whole point of requiring a "clear declaration" *by the State* of its waiver is to be certain that the State in fact consents to suit. But there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation. There is a fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress' expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity. In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals. That is very far from concluding that *the State* made an "altogether voluntary" decision to waive its immunity.

Accord, *Edelman v. Jordan, supra*, 415 U.S. at 673 ("[t]he mere fact that a state participates in a program through which the Federal Government provides assistance for the operation by the state of a system of public aid is not sufficient to establish consent on the part of the state to be sued in the federal courts.").

Indeed, if Congressional language was sufficient to overcome immunity without any clear manifestation by the state that it intended to waive its constitutional rights, then the concept of waiver will have become nothing more than another means to achieve abrogation. As the Court stated in *College Savings Bank*,

> Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would ... as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*. Forced waiver and abrogation are not even different sides of the same coin - they are the same side of the same coin. [527 U.S. at 683.]

Here, there has been neither a clear declaration by Congress of an intent to condition jurisdiction on a waiver of immunity nor a clear declaration by the state commission that it knowingly and voluntarily waived its immunity. The Court below found evidence of Congressional intent to condition regulatory jurisdiction on a waiver of immunity in the title of §252(e)(6). The Court stated "subsection 252(e)(6) provides for judicial review of 'state commission action,' not simply review of 'interconnection agreements'." *Id.* (quoting *MCI Telecommunications Corp. v. Illinois Commerce Commission*, 168 F.3d 315, 320, amended by 183 F.3d 558 (7th Cir. 1999), after rehearing, 222 F.3d 323 (7th Cir. 2000). In addition, the court relied on the finding in *MCI* that "[a]lthough the language of the statute does not contain the express waiver language that the commissions seek, the structure of the pertinent section of the statute, notably 47 U.S.C. §252 ... nevertheless makes clear that Congress intended to provide for federal court review of any regulatory determination made under the section...." 222 F.3d at 341.

This interpretation of the statutory language ignores this Court's repeated insistence on unmistakable clarity regarding an intent by Congress to require waiver of Eleventh Amendment immunity. First, as noted in Point I, above, state commission interpretation and enforcement of interconnection agreements is not even expressly provided for in the statute. That authority,

as well as the application of the jurisdictional provision in §252(e)(6), was "inferred" from the statute by the federal courts. Second, the Court below mischaracterizes the statutory language that is there. Although the title of §252(e)(6) is "Review of State commission actions," the language of that section specifically states that the federal court's review is limited to "whether *the agreement or statement* meets the requirements of section 251 of this title and this section." (emphasis added).* See, *Fairport, P. & E.R. Co. v. Meredith*, 292 U.S. 589, 594 (1934) (title of act only to be resorted to as aid to statutory construction if language of act itself is ambiguous). Thus, the statute contemplates that the review will be of the agreement and does not manifest with any clarity that it was aimed at the state commissions or was intended to require a waiver of Eleventh Amendment immunity.

Moreover, in finding a constructive waiver, the Court below relied on its prior decision in *MCI*, *supra*, 222 F.3d at 339-40, that, despite this Court's ruling in *College Savings Bank*, waivers of Eleventh Amendment immunity could still be implied. 179 F.3d at 569. The *MCI* court found that *College Savings Bank* only abandoned *"Parden*-style" constructive waivers, *i.e.*, waivers implied from participation in interstate activities regulated by Congress under the Commerce Clause. *Id.* (referring to *Parden v. Terminal Railway of the Ala. Docks Dept.*, *supra*, 377 U.S. 184 (1964)). The *MCI* court found that *College Savings Bank* did not preclude other types of constructive waivers, but rather "set boundaries" for Congressional attempts to impliedly waive a state's immunity.

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* The use of the term "statement" is a reference to §252(f) which permits an incumbent carrier to file a statement of the terms and conditions it generally provides in the state to comply with the requirements of §251. This statement must also be approved by the state commission. 47 U.S.C. §252(f)(2).

Id. However, by parsing the words of this Court's decision in *College Savings Bank,* the Court below lost sight of the decision's overall meaning. Constructive waivers, *i.e.*, those that are not express conditions within the statute but are implied by the federal courts, do not survive College Savings Bank. That decision could not have stated any more clearly that for a waiver of Eleventh Amendment immunity to be effective, there must be a "clear declaration" by the state to accept Congress' unambiguous offer. 527 U.S. at 680. No such declaration has been made or found here.

2. Even if the language of the statute was sufficiently clear to establish Congressional intent to condition state involvement in local telephone regulation on a waiver of immunity, the condition would be invalid. Congress was not acting here pursuant to its Spending Power and its allocation of federal and state responsibilities in the Telecommunications Act was not a "gift" that could be conditioned on a waiver of constitutional rights. As in *College Savings Bank,* it would be an impermissible and coercive sanction, excluding the state commissions from "otherwise permissible activity" if they decline to waive their immunity.

The concept of allowing Congress to condition the receipt of federal funds on a waiver of Eleventh Amendment immunity grows out of a line of cases that upheld similar statutes imposing other conditions on receipt of federal funds. See, *e.g. South Dakota v. Dole*, 483 U.S. 203 (1987) (conditioning federal highway funds on a state's agreement to raise its drinking age to 21); *Lau v. Nichols*, 414 U.S. 563 (1974) (conditioning federal financial assistance to schools on a state's agreement not to discriminate on the basis of race); See also, *Kansas v. U.S.*, 214 F.3d 1196, cert denied --U.S.--, 121 S.Ct. 623 (10th Cir. 2000) (listing cases upholding funding conditions). As this Court stated in *Pennhurst v. Halderman*,

supra, 451 U.S. at 17, "Legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the states agree to comply with federally imposed conditions."

Although *amici* could find no case where this Court has found valid a waiver of Eleventh Amendment rights as a Spending Clause condition, the Court has left open that possibility. *College Savings Bank, supra,* 527 U.S. at 686. In *College Savings Bank*, however, the Spending Clause was not at issue, because "what Congress threatens if the state refuses to agree to its condition is not the denial of a gift or gratuity, but a sanction: exclusion of the state from otherwise permissible activity." *Id.*

Here too, the issue is not Congress' power under the Spending Clause. What Congress threatens if the state refuses to agree to its condition is not the denial of a gift but the withdrawal of its right to retain a significant piece of its traditional jurisdiction over local telephone service. What the statute threatens if the waiver condition is not met, is the elimination of a state's power to protect its citizens in certain traditional areas of local concern. In this respect, *College Savings Bank* is directly on point. In *College Savings Bank,* the sanction was exclusion from participation in an interstate commercial activity. Here, the sanction is exclusion from aspects of local telephone regulation which are reserved for the states in the Act and which involve matters of state law and concern. The Court below's ruling thus leads to bizarre results: If the State of Illinois had decided to *become* a local telephone service provider, it would retain its Eleventh Amendment immunity under *College Savings Bank.* If it adjudicates disagreements between companies regarding interconnection agreements -- a distinctly sovereign function -- its immunity is deemed constructively waived.

The fact is that in this case, as in *College Savings Bank*, "where the constitutionally guaranteed protection of the states' sovereign immunity is involved, the point of coercion is automatically passed--and the voluntariness of waiver destroyed" when what is attached to the refusal to waive is exclusion of the state from exercising its sovereign powers to protect the public interest. The powers here have traditionally been exercised by the states and have been reserved to the states by Congress in the Act. They are not "gifts," but indications of Congress' recognition of the history and importance of state regulation of local telephone service.

The Court below's reliance on cases upholding, under the Tenth Amendment, delegation of regulatory jurisdiction in an otherwise preempted field, is similarly invalid. *Id.* at 342. In *Printz v. United States*, *supra*, 521 U.S. 898, the Court noted that "cooperative federalism" programs allowing for continued state involvement in an otherwise preempted field did not violate the Tenth Amendment, citing *Hodel v. Virginia Surface Mining & Reclamation Assn.*, *supra*, 452 U.S. 264, and *FERC v. Mississippi*, *supra*, 456 U.S. 742. The Court below viewed such state involvement as a "gratuity," comparable to offers of federal funds under the Spending Clause.

However, the statutory scheme here is not comparable to those in *Hodel* and *FERC*. In upholding the Surface Mining Act in *Hodel*, the Court relied on the fact that "[t]he States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program ...the full regulatory program will be borne by the Federal Government." 452 U.S. at 288. In the Telecommunications Act, however, the preemption provisions only permit the F.C.C. to take over in certain circumstances, *i.e.*, if a state commission fails to

institute or complete an arbitration or mediation, 47 C.F.R. 51.801, or if a state or local requirement conflicts with 47 U.S.C. §253(a) or (b).* If a state commission fails to act on a request for approval, the agreement is deemed approved. 47 U.S.C. §252(e)(4). If a state fails to act on a petition to interpret or enforce an approved agreement, the Act does not provide any remedy, as that power is not expressly contemplated in the statute. Unlike *Hodel*, therefore, state commission regulation in this area is not simply a federal benefit the states may choose to accept, it is an integral part of the federal/state allocation of jurisdiction under the Act.

Similarly, in *FERC v. Mississippi*, *supra*, 456 U.S. at 769, the Court rejected a Tenth Amendment challenge to the Public Utility Regulatory Policies Act. Although that statute did not include alternative federal regulation like the statute in *Hodel*, the Court found that the statute did not coerce a state to enforce a federal program because, as long as certain minimum federal standards were met, the Act allowed them to "enact and administer their own regulatory programs, structured to meet their own particular needs." *Id.* at 767 (quoting *Hodel*, 452 U.S. at 289). The Court also found that the review provisions of the Act were not unconstitutionally coercive because the state was asked only to adjudicate disputes arising under the statute, and "make its administrative tribunals available for the vindication of federal as well as state-created rights." *Id.* at 769.

In this case, however, the statutory scheme arises in an area of traditional state regulation and contemplates shared federal and state power, rather than a delegation of preempted

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* Moreover, §601 of the Act, Pub. L 104-104, §601 (codified at 47 U.S.C. §152, note), provides that the 1996 revisions to the Act "shall not be construed to modify, impair or supersede" state law unless "expressly" provided in the Act.

authority. This is not simply a situation where a state can decide not to participate, knowing that federal regulation will inevitably result. It is unclear what the result will be if a state commission declines to review disputes over interconnection agreements.* A decision to act, according to the Court below, subjects the state commissioners to suit in federal court. This is not a "gift" bestowed by Congress, that implies a voluntary waiver of constitutional immunity. It is a coercive sanction imposed in violation of the Eleventh Amendment.

In sum, *amici* States have not found a single case where this Court has upheld a statute that conditions state regulatory jurisdiction upon a waiver of Eleventh Amendment immunity, much less regulatory jurisdiction that had been exercised by the states until the last five years. The overlapping federal/state jurisdiction in the Telecommunications Act is not a "gift" bestowed by Congress on the states. It is a recognition by Congress that the statute addresses both interstate and intrastate

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* For example, Virginia's commission has issued orders in certain cases declining to decide disputes regarding already approved agreements. In one case, citing "unique circumstances," the F.C.C. extended its preemptive power to an enforcement decision, even though it acknowledged that its regulations allow for §252(e)(5) preemption only when a state fails to respond to a request for mediation or arbitration or complete a mediation or arbitration on a timely basis. *In the Matter of Starpower Communications*, 15 FCC Rcd. 11,277 (2000). In that case, the F.C.C. also upheld the company's pursuit of a simultaneous appeal in the district court as a mere exercise of "its right to seek alternative remedies." *Id.* In another case, the F.C.C. stated that the proper remedy for a state's determination not to decide enforcement disputes was to seek F.C.C. preemption rather than district court review. *In the Matter of Cox Virginia Telecom, Inc.*, 15 FCC Rcd. 17, 958 (2000). The Fourth Circuit, meanwhile, of which Virginia is a part, has ruled that federal review of enforcement decisions is barred by the Eleventh Amendment. *Bell Atlantic Maryland, supra*, 240 F.3d 279. This jurisdictional maze does not lead to any certainty as to what the result will be if a state commission declines this purported "gift."

matters, and that certain local concerns may be better addressed through the participation of the state commissions. Requiring waiver of constitutional rights in exchange for the state's traditional regulatory jurisdiction is inherently coercive and offensive to state sovereignty.

There is also no clearly expressed intention in the statute that unmistakably conditions the exercise of regulatory authority over local telephone service on a waiver of immunity. Nor do the state's actions clearly manifest a knowing and voluntary waiver of immunity. If the doctrine of constructive waiver is no longer valid when a state participates in "lawful activity" affecting interstate commerce, it is also no longer valid when a state exercises responsibilities preserved for it by Congress in a statute. This Court has never extended the principle of *South Dakota v. Dole* this far, and it should not do so here.

III. *EX PARTE YOUNG* PROVIDES A FEDERAL REMEDY WHERE NECESSARY TO VINDICATE FEDERAL RIGHTS AND THE SUPREMACY CLAUSE. IT DOES NOT PROVIDE A FEDERAL FORUM FOR REVIEW OF STATE ADMINISTRATIVE AGENCY ACTION.

Another recognized exception to Eleventh Amendment immunity is the doctrine established in *Ex Parte Young*, 209 U.S. 123 (1908). Under *Ex Parte Young* state officials can be sued individually for prospective relief to enjoin continuing violations of federal law. *Edelman v. Jordan, supra*, 415 U.S. 651. The purpose of the exception is to ensure that a remedy exists to stop continuing violations of federal law, thus "giv[ing] life to the Supremacy Clause." *Green v. Mansour*,

474 U.S. 64, 68 (1986). However, this Court has recently affirmed that *Young* does not authorize suits against state officials in every action merely because prospective injunctive relief is sought. *Idaho et al. v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261(1997). Instead, "[a]pplication of the Young exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction." *Id.* at 270. Permitting a federal action against the state commissioners here is not necessary to vindicate federal rights or ensure the supremacy of federal law. What is sought is not a prospective injunction against ongoing violations of federal law, but a review of state administrative agency action. The *Ex Parte Young* exception is therefore inapplicable.

Applying the exception to Eleventh Amendment immunity set forth in *Ex Parte Young* to the actions of the state officials in this case is not consistent with the purpose of the exception. The state officials here are not alleged to have violated any constitutional provision. They are not alleged to have exceeded the scope of their authority under the Act or to have failed to perform a mandatory duty. They simply interpreted the substantive provisions of an interconnection agreement. Although one party will inevitably disagree with the commission's outcome, this is not a situation where the intervention of the federal courts is necessary to vindicate federal rights. If *Ex Parte Young* applies here, it will essentially provide an alternate federal forum for state administrative agency review every time a case raises mixed questions of state and federal law. This is not the purpose of the exception to Eleventh Amendment immunity set forth in *Ex Parte Young*.

Ex Parte Young involved actions by state officials that violated the Fourteenth Amendment. 209 U.S. at 148-49.

Noting that the Eleventh Amendment prohibited actions against the states while the Fourteenth Amendment was specifically directed at state action, *id.*, the Supreme Court ruled that "individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten ... to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action." *Id.* The Court reasoned, "The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect the state in its sovereign or governmental capacity." *Id* at 159-60. Thus, the state officer is "stripped" of his official character and is not protected by the Eleventh Amendment. *Id.*

Since *Ex Parte Young*, the Court has affirmed its vitality as a necessary means to ensure compliance with the Fourteenth Amendment and the supremacy of federal law. See, *Edelman v. Jordan*, *supra*, 451 U.S. at 664 (*Ex Parte Young* "has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect."); *Green v. Mansour, supra*, 474 U.S. at 68 ("Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."). However, "the theory of *Young* has not been provided an expansive interpretation." *Pennhurst v. Halderman, supra,* 465 U.S. at 102. The exception has been limited to actions for prospective injunctive relief against ongoing violations of federal law. *Edelman, supra,* 415 U.S. 651. It has been found inapplicable to actions seeking compliance with state law. *Pennhurst, supra,* 465 U.S. 89. It has also been found inapplicable where Congress has otherwise provided a remedy for the federal violation at issue. *Seminole Tribe, supra,* 517 U.S. 44.

In *Seminole*, the Court's decision was based on its view that "[t]he situation presented here ... is sufficiently different from that giving rise to the traditional Ex Parte Young action so as to preclude the availability of that doctrine." *Id.* at 73. The Court elaborated on this in *Idaho v. Coeur d'Ilene,* 521 U.S. 261 (1997) in which, while not questioning the continued validity of the *Ex Parte Young* fiction, the Court acknowledged that "the state itself will have a continuing interest in the litigation whenever state policies or procedures are at stake." *Id.* at 269. Thus, the Court found that *Ex Parte Young* does not apply simply because the complaint asks for prospective injunctive relief against state officials:

> To interpret Young to permit a federal court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last Term in Seminole Tribe, that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading. [*Id.* at 270].

Here, applying *Ex Parte Young* would be contrary to the real interests served by the Eleventh Amendment. This is not a case where proceeding under *Ex Parte Young* is necessary to vindicate federal rights or ensure the supremacy of federal law. The state commission here did everything required of it under the statute. It simply reached a result, as a matter of contract

interpretation, that one party to the contract disputes.* Although that party may believe that there has been an error of law, the state commission's actions here are the actions of the sovereign and do not fit the parameters of the *Ex Parte Young* fiction. In *Pennhurst, supra*, 465 U.S. at 113, the Court stated "at least insofar as injunctive relief is sought, an error of law by state officers acting in their official capacities will not suffice to override the sovereign immunity of the State where the relief effectively is against it." See also, *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 695 (1949) (" if the actions of an officer do not conflict with the terms of his valid

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* That result is not even inconsistent with federal law. The Court below noted that the F.C.C. had issued a declaratory ruling after this case was filed that set forth its view that calls to internet service providers were not local calls. 179 F.3d at 571. See, *Bell Atlantic Telephone Co. v. F.C.C.*, 206 F.3d 1 (D.C. Cir. 2000) (reversing and remanding the F.C.C.'s decision for an explanation of the agency's reasoning). The Court below also noted, however, that the F.C.C. had ruled that parties could agree to compensate each other for such calls during negotiations, and that the interpretation of agreements entered into prior to the declaratory ruling should be made by the state commissions. 179 F.3d at 572-73. See also, *In the Matter of Implementation of the Local Competition Provisions in the Ttelecommunications Act of 1996*, Dkt. Nos. 96-98, 99-68, -- F.C.C. Rcd. ---, 2001 WL 431687 (F.C.C.) (April 27, 2001) (determining that compensation for internet bound calls is subject to F.C.C. jurisdiction, establishing an interim cost recovery method pending additional proceedings, but specifically stating "[t]his Order does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here."). In this case, the parties specifically included in their agreement that the state commission would have the right to define local traffic for reciprocal compensation purposes. 179 F.3d at 572-73. The state commission's decision therefore was fully within its authority and, it appears, consistent with federal law. *Id.* at 572. This is not a situation where the commissioners must be "stripped" of their official immunity in order to protect federal rights.

statutory authority, then they are the actions of the sovereign..." and "cannot be enjoined or directed....").

What this is, in essence, is an appeal of administrative agency action. Normal state procedures for the review of final agency action are available. Invoking *Ex Parte Young* to allow an appeal of state agency action in federal court is inconsistent with principles of federalism. See, *Rooker v. Fidelity Trust Co., supra,* 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman, supra*, 460 U.S. 462 (1983). See also, *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 369 (1989) ("[T]he State's trial-and-appeals process is treated as a unitary system, and for a federal court to disrupt its integrity by intervening in mid-process would demonstrate a lack of respect for the State as sovereign."). Although the review entails questions of both state and federal law, 179 F.3d at 574, state courts are more than capable of reviewing the federal law aspects of this case. See, *Testa v. Katt, supra*, 330 U.S. 386. In fact, the state court may be a preferable forum. As noted by the Court below, the allocation of authority between state and federal courts that results from its decision, "has a potential to cause problems." 179 F.3d at 573. As the Court explained, "every time a carrier complains about a state agency's action concerning an agreement, it must start in federal court (to find out whether there has been a violation of federal law) and then may move to state court if the first suit yields the answer "no."" *Id.* at 574.*

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* Ironically, the Court states further that this problem is for the legislative branch to repair, without acknowledging that the extension of federal jurisdiction to enforcement actions was of judicial making. See Point I, above.

The inappropriateness of extending *Ex Parte Young* to this case is evident when one examines what a federal action here would look like. With the individual state commissioners as the defendants, the redressibility of plaintiffs' claims is called into question. Generally, the state commissioners act as a body, with a majority vote required to bind the commission. Ill. Cons. Stat. Ch. 220 § 5/2-101. Although the Court below held that the alleged violation of federal law in this case was "ongoing," a favorable ruling for plaintiffs would at best result in an order commanding each individual commissioner to vote in a particular way in the future if the issue comes before the commission again. Assuming such an order could be issued, see, *Pennhurst, supra,* 465 U.S. at 117; *Printz v. U.S., supra*, 521 U.S. 898, there is no guarantee, unless the federal court remands to the state commission, that this term of the contract between these parties will come before the commission again or that the same commissioners will still be in office to review it. See, *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). Moreover, a remand to the commission for the individual commissioners to vote as the District Court directs, serves no purpose. The real purpose of appealing the commission's decision is to have the Court determine if that decision is contrary to law, and reverse it if it is. This can easily be accomplished in the state court proceedings without threatening any federal rights or the supremacy of federal law.

As in *Seminole Tribe*, "the situation presented here is sufficiently different from that giving rise to the traditional Ex Parte Young action so as to preclude the availability of that doctrine." 517 U.S. at 73. Simply styling the action as a request for prospective injunctive relief against the state commissioners does not transform this action into anything other than what it is -- an appeal of state administrative agency action in the federal court. Applying *Ex Parte Young* would not be consistent with this Court's recognition of the Eleventh

Amendment's real limitation on the power of the federal government. Accordingly, as an *Ex Parte Young* action is not necessary in this instance to vindicate federal rights or law, the matter should proceed through normal state court review to determine if the decision of the commission was arbitrary, capricious or contrary to law.

CONCLUSION

For the foregoing reasons, the decision below finding federal court jurisdiction over state commission decisions enforcing or interpreting interconnection agreements should be reversed. Such jurisdiction is contrary to the language and structure of the Telecommunications Act and the Eleventh Amendment to the Constitution.

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